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No. 347

Supreme Court of the United States

OCTOBER TERM, 1966

FRANK L. SWACKER, JR., ET AL., AND RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Petitioners*,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JEROME ACKERMAN
JOHN S. KOCH
Attorneys for Respondent Southern Railway Company
701 Union Trust Building
Washington, D. C. 20005

Of Counsel:

W. GRAHAM CLAYTOR, JR.

JAMES I. HARDY
P. O. Box 1808
Washington, D. C. 20013

LESLIE M. MULLINS

ROBERT T. WINSTON
Norton, Virginia 24273

COVINGTON & BURLING
701 Union Trust Building
Washington, D. C. 20005

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OPINION BELOW

The two reports of the Special Master and the opinions of the District Court and the Court of Appeals are not reported but are set forth in appendices to the petition for certiorari. The Special Master's first report is reprinted as Appendix A (Pet., p. 27); his second report as Appendix B (Pet., p. 48); the District Court's opinion as Appendix C (Pet., p. 68); and the Court of Appeals' opinion as Appendix D (Pet., p. 96).

QUESTIONS PRESENTED

Whether the Court of Appeals erred in affirming the District Court's finding that certain employees of a railroad whose stock was acquired by another carrier pursuant to ICC approval were not placed in a worse position with respect to their employment as a result of the approved stock acquisition?

Whether the Court of Appeals erred in affirming the District Court's findings with respect to the amount of compensation to be paid to certain other employees of the acquired carrier found to be entitled to some compensation under employee protective provisions imposed by the ICC as a condition to its approval of the acquisition?

STATEMENT

On June 6, 1961, Southern Railway Company, respondent (Southern), acquired all of the outstanding stock of the Interstate Railroad Company (Interstate), a small freight carrier operating entirely within Wise County, Virginia. The acquisition had been approved by the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)). As a condition of its approval, the ICC imposed, pursuant to Section 5(2)(f) of the Act, certain employee protective provisions. Section 5(2)(f) of the Act provides in part as follows:

> "As a condition of its approval, under this paragraph of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period

> of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. . . ."

The protective provisions imposed by the ICC were the same as those which the ICC had laid down nine years earlier in the *New Orleans Union Passenger Terminal* case, 282 I.C.C. 271 (1952), and are known as the "New Orleans Conditions." The Railway Labor Executives' Association, one of the petitioners herein, had sought to have the ICC include for the benefit of Interstate employees protective provisions other than the New Orleans Conditions, but the ICC dismissed the RLEA's petition.

Following Southern's acquisition of the stock of Interstate* two suits were filed against Southern in behalf of Interstate employees who claimed that they had been placed in a worse position with respect to their employment as a result of the acquisition and were entitled to compensation under the New Orleans Conditions. One suit (the *"Swacker"* case) was filed in the United States District Court for the Western District of Virginia. The other (the *"RLEA"* case) was transferred to the same court from the United States District Court for the District of Columbia.

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* Southern still owns the Interstate stock, and the separate corporate identity of the acquired corporation has been fully preserved. (Pet. pp. 56, 72, 84, 105).

The two cases were consolidated and referred to a Special Master for the taking of testimony.

The Special Master filed two reports. (Pet., pp. 27, 48). Adopting most of the findings set forth in the Special Master's second report but rejecting certain others, the District Court entered judgment denying altogether the claims of 20 plaintiffs in the *Swacker* case and 7 plaintiffs in the *RLEA* case, and awarding only part of the compensation sought by the 25 remaining plaintiffs in the *Swacker* case. (Pet., p. 68). All plaintiffs appealed.

Southern also appealed, with respect to the partial recovery awarded to the 25 plaintiffs in the *Swacker* case.

The cross appeals were briefed and argued before the Court of Appeals for the Fourth Circuit, which affirmed the findings and conclusions of the District Court in all respects. (Pet., p. 96). Petitioners now seek review in this Court upon writ of certiorari.

1. The determination below that 27 of the plaintiffs were not entitled to any recovery was based on a finding of no causal relationship between Southern's acquisition of Interstate's stock and the employment status of the 27 plaintiffs. (Pet., pp. 48, 50, 71-72, 112-13). More specifically, the Special Master and the District Court found that with one exception,* all of the plaintiffs had been furloughed, *i.e.*, temporarily laid off, with no impairment of seniority and subject to recall when their services were needed. (Pet., pp. 37, 68-69, 71, 99). All but two of the furloughed employees had

* One of the plaintiffs had been discharged for drinking intoxicants during working hours. (Pet., pp. 38-39).

been furloughed *prior* to the acquisition of Interstate's stock. (Pet., 37, 38, 71, 99, 101, 111). The two furloughed after the acquisition were furloughed as part of an economy measure which had begun before the acquisition and which continued thereafter. (Pet., pp. 43, 87, 112).

Additionally, the Special Master and the District Court found that Interstate had a long standing practice of furloughing employees whose services were not needed and that this practice antedated the acquisition of Interstate's stock. (Pet., pp. 37, 71, 101). The Special Master and the lower court also found that none of the employees involved in these cases had been furloughed by Interstate upon Southern's recommendation or in anticipation of Southern's acquisition of Interstate's stock. (Pet., pp. 43, 49, 71, 102).

With respect to the 12 so-called maintenance-of-way workers to whom no recovery was allowed, the Special Master and the District Court found that, while they had been originally furloughed as part of a seasonal layoff, they were not subsequently recalled to work because of the introduction by Interstate of internal technological improvements. (Pet., pp. 43, 50, 86-87). No evidence was introduced showing any causal connection between the acquisition and the technological improvements. And the District Court expressly found that the improvements could have been made by Interstate whether or not Southern had purchased its stock. (Pet., p. 87). The District Court also concluded, on the basis of the ICC's opinion in *Southern Railway Company—Control—Central of Ga. Ry. Co.* case, 317 I.C.C. 729 (1963). *aff'd,* 226 F. Supp. 521 (E.D. Va. 1964), *vacated and remanded on other grounds,* 379 U.S. 199 (1964), that even if the techno-

logical improvements had been related to the acquisition, the furloughs would not have been the "result" of the acquisition within the meaning of the ICC's protective provisions. (Pet., pp. 87-89).

The question whether employees who had been furloughed before the acquisition for reasons unrelated to the acquisition and who were not recalled to work because of subsequent technological improvements would be entitled to benefits under the New Orleans Conditions was briefed and argued in the Court of Appeals. The Court of Appeals, however, refrained from deciding the issue because, in its view, the factual determinations made by the District Court fully disposed of the suits of the 27 plaintiffs whose claims were denied in their entirety. (Pet., p. 112).

The Court of Appeals rested its affirmance of the District Court's judgment with respect to the 12 maintenance-of-way workers on the fact that the furloughing of the workers and the decision not to recall them was the result of "an economy measure which had begun before Southern's acquisition and expanded thereafter" and on the fact that "The master found, and the District Judge held, that the displacement of these men was not a result of the acquisition. . . .", *i.e.*, no causal connection, financial or otherwise, had been shown to exist between the maintenance-of-way workers not being recalled and the acquisition. (Pet., pp. 111, 112).

2. The 25 plaintiffs in the *Swacker* case who were awarded compensation by the District Court consisted of 21 car laborers, 2 machinists, a blacksmith and a welderman, all employed by Interstate at its Andover shop. (Pet., pp. 64-65). At the time the acquisition

became effective all 25 were on furlough. (Pet., p. 66). The Special Master found, however, and the District Court accepted the finding, that, but for the acquisition, these 25 employees would have been temporarily recalled by Interstate to perform certain experimental repair work which was performed by Southern employees at Southern's Koster Shop in Knoxville, Tennessee, and that accordingly these 25 employees were entitled to compensation under the protective provisions. (Pet., pp. 65-66).

The District Court, however, rejected the Special Master's conclusion that other work which was performed after the acquisition by wholly independent contractors and not by Southern was work for which Interstate's employees were entitled to compensation under the protective provisions. (Pet., pp. 81-83). As the District Court noted, "the same decision [to have the work performed by independent contractors] could (and probably should) have been made by Interstate even if there had been no acquisition." (Pet., p. 81). In short, the District Court found the absence of a causal connection between the acquisition and the performance of this work by independent contractors. (Pet., pp. 81-83).

The District Court also rejected the Special Master's conclusion that once an employee showed himself entitled to some compensation he was automatically to be awarded the equivalent of four years' continuous pay (less amounts actually earned from other sources or received in unemployment compensation). (Pet., pp. 77-80). The District Court's reasoning, approved by the Court of Appeals, was that a furloughed employee who showed only that, as a result of an

acquisition, he was not temporarily recalled was entitled to no more than the wages he would have been paid for the temporary work. (Pet., pp. 79-80, 108). The District Court recognized that Section 5(2)(f) of the Act required the ICC to protect against employees' being put in a *worse* position with respect to their employment, not to give them a "windfall" by placing them in a *better* position than they would have been in had there been no acquisition. (Pet., p. 79). Accordingly, the District Court concluded that the 25 employees were entitled only to amounts they would have received had the experimental repairs been performed at Interstate's Andover shop instead of at Southern's shop in Knoxville. (Pet., p. 79). The Court of Appeals affirmed. (Pet., pp. 108, 113).

REASONS FOR DENYING THE WRIT

1. It is axiomatic that a petition for certiorari seeking review of the evidence underlying findings of fact by a District Court which have been sustained by a Court of Appeals does not warrant exercise of the Court's certiorari jurisdiction. This axiom is clearly controlling here with respect to petitioners' claims on behalf of the 12 maintenance-of-way workers and the 7 clerks.

With respect to the 12 maintenance-of-way workers, the issue framed by petitioners in the second of their questions presented is whether the Court of Appeals' affirmance of the lower court's denial of recovery was erroneous:

> ". . . when there is no evidence to support it, and when in fact the evidence is uncontradicted that had there been no acquisition that [sic] Interstate planned to continue to maintain its tracks by hand." (Pet., p. 3).

With respect to the seven clerks, petitioners frame the issue in the third of their questions presented as:

> "Whether this finding [that none of the 7 plaintiffs were furloughed by reason of or in anticipation of Southern's acquisition] which is contrary to the uncontradicted facts, can stand?"

In this case, two reports by a Special Master were reviewed by the District Court in arriving at its findings of fact as to the absence of a causal connection (1) between the acquisition of Interstate's stock by Southern and the furloughing or failure to recall the seven clerks, and (2) between the acquisition of Interstate's stock and the furloughing of the 12 maintenance-of-way workers, or the technological improvements which made their recall unnecessary. The Court of Appeals was satisfied that the evidence supported both the findings with respect to the seven clerks and the findings that the displacement of the maintenance-of-way employees was an economy measure which had begun before Southern's acquisition and expanded thereafter, and was not a result of the acquisition. Accordingly, the Court of Appeals properly concluded that it had no occasion to rule on whether technological improvements which adversely affected an employee entitled him to benefits.*

It follows, therefore, that the petition is, in reality, an effort to obtain in this Court a third judicial review of the evidence and should be denied.

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* Contrary to statements in the petition (Pet., pp. 2-3), Southern never admitted and neither the Special Master nor the lower court held that the maintenance-of-way workers were adversely affected by Southern's acquisition of Interstate. Southern's position has always been exactly the opposite, and its position was upheld by the Special Master, the District Court and the Court of Appeals. (Pet., pp. 50, 87, 111).

2. The petition, insofar as it deals with the 25 employees who were awarded a smaller recovery than they sought, likewise does not justify exercise of the Court's certiorari jurisdiction. Not only was the decision below plainly correct, but the factual situation to which it relates is unsual and unlikely to recur. The courts below found that the 25 employees involved had been furloughed by Interstate prior to, and not in anticipation of the acquisition. Their only claim which the lower courts recognized as valid was that they had not been temporarily recalled to perform experimental repair work on certain Interstate cars. The work was performed by Southern's employees over a period of approximately two months.

The issue as to these 25 employees is simply whether they were entitled to four years' compensation because they were not temporarily recalled to perform a temporary job which lasted for two months. The courts below held that, properly construed, Section 5(2)(f) of the Act and the protective conditions thereunder were intended to prevent employees from being placed in a worse position by reason of an acquisition than they would otherwise have been in. Accordingly, the amounts awarded to these employees were designed to compensate them for the temporary loss of work.

The petition, however, urges that the 25 employees should receive compensation for four years even though they lost only two months of work. In effect, petitioners claim that they should be placed in a better position than they would have been in absent the acquisition. In short, petitioners seek, as the lower court correctly characterized it, a "windfall." (Pet., p. 79).

In an effort to sustain their position, which has no support whatever in the statute, petitioners attempt to rely on Sections 7(a) and (c) of the Washington Job Protection Agreement of 1936. The latter, subject to certain limitations, is incorporated in the New Orleans Conditions. Petitioners also attempt to rely on one of the provisions of the so-called Oklahoma Conditions which is also incorporated in the New Orleans Conditions. Like the statute, however, neither of these provisions supports petitioners' contentions.

Nothing in the lower court's ruling is inconsistent with the portions of the provisions cited by petitioners, which indicate only that protection is to extend for four years. The issue before the lower court was not the length of time employees were to be protected against adverse effects of an acquisition.* The issue was measurement of the adverse effect or, more particularly, the amount to which the 25 employees were entitled.

On this question, the protective provisions do not provide a precise answer as they do in the case of laid-off employees who are initially discharged as a result of an acquisition. In such a case, the four-year period automatically becomes the measurement of the adverse effect. Here, however, the District Court recognized the significant difference between an employee discharged because of an acquisition and an employee furloughed for reasons unrelated to an acquisition whose only grievance is that, because of the acquisition,

* It is perfectly clear that had any of the 25 employees been adversely affected again for a temporary period by improperly not being recalled to work during the four-year period, they would again have been entitled to compensation to the extent that they were adversely affected.

he was not recalled for temporary work. The District Court acted properly in applying the protective conditions to the latter situation in a matter completely in harmony with the underlying statute and pertinent expressions of intent and policy by the ICC, and the Court of Appeals properly affirmed.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JEROME ACKERMAN

JOHN S. KOCH

Attorneys for Respondent
Southern Railway Company
701 Union Trust Building
Washington, D. C. 20005

Of Counsel:

W. GRAHAM CLAYTOR, JR.

JAMES I. HARDY
P. O. Box 1808
Washington, D. C. 20013

LESLIE M. MULLINS

ROBERT T. WINSTON
Norton, Virginia 24273

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Washington, D. C. 20005

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